Office - Supreme Court, U
FILED
MAR 11 1954
HAROLD B. WILLEY, Cler

IN THE

Supreme Court of the United States

October Term, 1953

347 U.S.
CHA-COL
8

No. 630

CHARLES CHAPLIN,
Petitioner,

vs.

HON. JOHN W. CLANCY,
Respondent.

CHARLES CHAPLIN,
Third Party Defendant-Petitioner,

vs.

RINA M. KRAVETZ, as Executrix, etc.,
Defendant-Respondent,

and

MARY PICKFORD,
Plaintiff,

and

THE PICKFORD CORPORATION, UNITED ARTISTS CORPORATION, ARTHUR B. KRIM, ROBERT S. BENJAMIN, SEYMOUR M. PEYSER, MATTHEW FOX, WALTER E. HELLER & CO. INC., PAUL V. McNUTT and FRANK L. McNAMEE,
Third Party Defendants.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MYLES J. LANE,
Counsel for Petitioner.

APPELLATE PRESS CORP., 114 WORTH STREET, N. Y., COrtlandt 7-7627

INDEX

	PAGE
Opinion Below	2
Jurisdiction	2
Statutes Involved	2
Questions Presented	2
Statement	3
Specification of Errors to be Urged	7
Reasons for Granting the Writ	8
Argument	10
POINT I—The Court of Appeals had power to review the District Court's rulings	10
POINT II—The Court of Appeals erred in declining to review the District Court's rulings by means of an extraordinary writ	12
A. No adequate remedy exists by way of appeal.	13
B. The District Court's order denying the motion to quash service was clearly erroneous	15
C. The denial of petitioner's cross-motion to set aside the Federal process and the order sustaining service was clearly erroneous	19
D. The District Court's errors were jurisdictional	21
Conclusion—The petition for a writ of certiorari should be granted	22
Appendix A	23

AUG 10 1955

217358

Authorities

PAGE

CASES

Ayres v. *Wiswall*, 112 U. S. 187 ..... 9, 19

Bankers' Life & Casualty Co. v. *Holland*, 346 U. S. 379 ..... 12, 21

Blane v. *Young* (N. D. Ohio), 10 F. R. D. 109 ..... 16, 19

Ex parte Peru, 318 U. S. 578 12

First National Bank v. *Ingerton* (10th Cir.), 207 F. 2d 793 ..... 9, 16

Hancock Insurance Co. v. *Gooley*, 196 Wash. 16, 83 F. 2d 221 16

Henderson v. *Henderson*, 247 N. Y. 428 13

Judson v. *Judson* (D. D. C.), 8 F. R. D. 336 ..... 9, 17

Leigh v. *Lynton* (E. D. N. Y.), 9 F. R. D. 28 ..... 16, 19

McClellan v. *Carland*, 217 U. S. 268 12

Roche v. *Evaporated Milk Association*, 319 U. S. 21 12

Rovinski v. *Rowe* (6th Cir.), 131 F. 2d 687 19

United States v. *Waverly Club* (S. D. N. Y.), 22 F. 2d 422 19

Waco v. *U. S. Fidelity & Guaranty Co.*, 293 U. S. 140 ..... 8, 9, 10

Zuckerman v. *McCulley* (E. D. Mo.), 7 F. R. D. 739 .. 9, 18, 19

STATUTES

28 U. S. C. Section 1651(a) 23

Federal Rules of Civil Procedure, Rule 4(d)(1) 3, 4 15-19, 23

New York Civil Practice Act, Section 237-a 14-15, 23

MISCELLANEOUS

Moore's Commentary on the 1949 U. S. Judicial Code .. 12

Moore, Federal Practice (2d ed.), Vol. II 9, 18, 19

New York Law Journal, July 22, 1953 5

IN THE

Supreme Court of the United States

October Term, 1953

No.

CHARLES CHAPLIN,

Petitioner,

vs.

HON. JOHN W. CLANCY,

Respondent.

CHARLES CHAPLIN,
Third Party Defendant-Petitioner,

vs.

RINA M. KRAVETZ, as Executrix, etc.,
Defendant-Respondent,

and

MARY PICKFORD,

Plaintiff,

and

THE PICKFORD CORPORATION, UNITED ARTISTS CORPORATION, ARTHUR B. KRIM, ROBERT S. BENJAMIN, SEYMOUR M. PEYSER, MATTHEW FOX, WALTER E. HELLER & CO. INC., PAUL V. MCNUTT and FRANK L. MCNAMEE,
Third Party Defendants.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Charles Chaplin prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above entitled case on February 11, 1954, denying a petition for a writ of

mandamus or, in the alternative, for a common law writ of certiorari.

Opinion Below

The opinion of the Court below (92)* is not yet reported.

Jurisdiction

The judgment of the Court of Appeals was entered on February 11, 1954. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1).

Statutes Involved

The pertinent statutory provisions are printed in Appendix A, *infra,* page 23.

Questions Presented

1. Has a Court of Appeals the power to review the pre-remand proceedings of a District Court, where, after an improper removal, a party has been brought into a case by means of an illegal service of Federal process.

2. Has a Court of Appeals the power, prior to remand, to exercise its appellate jurisdiction by way of an appropriate extraordinary writ, in a case where the right to review a prejudicial ruling of a District Court is otherwise precluded.

3. Is it error for a Court of Appeals to withhold such relief, on a theory that the District Court's ruling should be reviewed by a State Court.

---

* Unless otherwise indicated, references are to pages of the printed record.

4. Is it error for the Court of Appeals to withhold such relief in a case where the State law provides no apparent machinery for review of the Federal ruling.

5. Is leaving a copy of a summons and complaint in the office of the manager of a hotel, at which a party is stopping temporarily, a mode of service authorized by Rule 4(d)(1) of the Federal Rules of Civil Procedure.

6. Where removal of a case was improper in the first instance, should the Federal Court's process and orders, with respect to a party over whom the state court had no jurisdiction prior to removal, be vacated at the time of remand.

Statement

This proceeding was instituted in the Court of Appeals to obtain a writ of mandamus directing the Honorable John W. Clancy, United States District Judge for the Southern District of New York, to vacate certain proceedings had before him relating to petitioner, or, in the alternative, to obtain a common law writ of certiorari to review those proceedings.

The action out of which this proceeding arose was commenced on or about February 21, 1951 in the Supreme Court of the State of New York, in and for the County of New York, by plaintiff, Mary Pickford, against defendant, Max M. Kravtez (5). The complaint sought to recover monies loaned to Kravetz in the sum of thirteen thousand four hundred and forty-nine dollars and ninety cents ($13,449.90) (6). On or about March 19, 1951, the defendant Kravetz interposed an answer asserting counterclaims and cross claims against plaintiff Pickford and a number of third persons including petitioner (6). In his answer Kravetz sought to recover six hundred and sixteen thousand five hundred and fifty dollars and sixteen cents ($616,550.16)

for work, labor and services allegedly performed and as damages for an alleged conspiracy to injure him (6).

On or about May 15, 1951, third-party defendant United Artists Corporation, a Delaware corporation, caused the action to be removed to the United States District Court for the Southern District of New York, pursuant to 28 U. S. C. Section 1441, alleging diversity of citizenship and the existence of a separate cause of action with respect to it (6). The defendant Kravetz acquiesced in such removal, and no application was made to remand the action to the State Court until November, 1953—some two and one-half years after the date of the original removal (6).

At the time of the removal of the action to the Federal Court in May, 1951, no jurisdiction had been acquired by the New York Courts over petitioner, who was then a resident of the State of California, and no process had been served upon him (6). On or about September 12, 1952, after the action had been pending in the Federal Court for some sixteen months, a purported substituted service of Federal process was made upon the petitioner. That service was not made personally but was attempted to be effected by leaving a copy of the third-party summons and complaint with the manager of the Hotel Sherry-Netherland, in New York City, where the petitioner stopped for approximately ten days enroute from his home in California to Europe (6-7, 28-30, 34).

On October 10, 1952 petitioner applied in the District Court to quash and vacate the purported service of process. That motion came on to be heard on October 21, 1952 before the respondent Hon. John W. Clancy (7, 41-63). On November 10, 1952, Judge Clancy handed down an opinion holding the alleged service valid as having been made in compliance with the requirements of Rule 4(d)(1) of the Federal Rules of Civil Procedure (7, 18-22). That opinion (18-22) is reported in 17 Fed. Rules Serv., ¶4(d). 121. A

formal order denying the motion to quash was made and entered on November 20, 1952 (7, 23).

The order of November 20, 1952, was non-appealable and, at the time it was entered, no method existed for obtaining review thereof prior to trial of the action and the entry of a final judgment. Accordingly, petitioner interposed an answer in December of 1952, in which answer he alleged as an affirmative defense that service of process had never validly been made upon him and that the District Court had never acquired jurisdiction over his person (7).

On or about November 13, 1953, the defendant Kravetz made a motion to remand the action to the Supreme Court of New York on the ground that no separate or independent claim had been alleged against United Artists or any of the impleaded defendants and that the original removal to the Federal Court had been unauthorized and improper (7-8).

The motion to remand the action to the Supreme Court of the State of New York placed petitioner in this anomalous position: His opportunity to obtain appellate review of the order sustaining service would be entirely cut off by remand, for there could be no final judgment from which an appeal would lie to the Court of Appeals, and under New York law there was no apparent machinery for obtaining such review in the State Courts. Yet, the decision upholding service was believed to be incorrect and had been the subject of published criticism. See N. Y. L. J., July 22, 1953, p. 122. The anomaly was heightened by the fact that the process and the order sustaining it were the acts of a Court which concededly never acquired valid jurisdiction over the action. Accordingly, the effect of remand would be that petitioner would be brought in as a party in the State Court, without recourse to an appellate tribunal, purely as the result of the improper issuance of Federal process and an erroneous Federal ruling

sustaining the service thereof, notwithstanding that no basis for Federal jurisdiction ever existed.

The petitioner thereupon made a cross-motion, based upon the conceded impropriety of the original removal, requesting Judge Clancy to vacate the order of November 20, 1952, which had denied petitioner's motion to quash the purported service of process, and to declare that all proceedings in the action since its removal to the Federal Court were without binding effect upon the petitioner (8-9, 66-71).

On January 12, 1954 Judge Clancy handed down an opinion granting the motion to remand and denying the cross-motion of petitioner (9, 24). The opinion (24) is unreported. In effect, Judge Clancy ruled that upon remand of the action to the State Court petitioner would be deemed a party thereto, although the only process alleged to have been served upon him was that of the Federal Court which never acquired valid jurisdiction over the action. At the same time, the Court foreclosed the petitioner from obtaining, in the normal fashion, an appellate review on the merits of the order dated November 20, 1952, notwithstanding the doubt which existed as to its soundness.

While the remand itself was of course non-reviewable, petitioner desired to safeguard his legal rights with regard to the proceedings *prior to* remand. Accordingly, before the entry of any order upon Judge Clancy's decision (9), the petitioner applied to the United States Court of Appeals for the Second Circuit for a writ of mandamus directing Judge Clancy to vacate the order theretofore made by him, dated November 20, 1952, sustaining the service, and to declare all proceedings had in the action to be without force and effect insofar as they related to petitioner. The petitioner requested the Court of Appeals, in the alternative, to issue a common law writ of certiorari to review the order of November 20, 1952 and the proceedings below in respect thereto.

On February 11, 1954, the Court of Appeals denied the petition in a *per curiam* opinion which read as follows:

> "There is uncertainty as to our power to act in the premises; but we are clear that the state court of first instance or on appeal has full authority to settle the issue as to the validity of the service upon defendant Chaplin. See New York Civil Practice Act, § 237(a)(4); 17 Ann. Reports New York Judicial Counsel, 62, 63 (1951). That tribunal we believe is now the appropriate one for all adjudication in the premises." (92).

Since the decision of the Court of Appeals, the case has continued to repose in the Federal Courts under successive stays granted respectively by Judge Augustus Hand of the Court below (94) and Justice Jackson of this Court.*

Specifications of Errors to Be Urged

The Court of Appeals erred:

1. In failing to hold that it had jurisdiction to review the pre-remand proceedings in the District Court.

2. In failing to hold that its jurisdiction could appropriately be exercised through the medium of an extraordinary writ.

3. In holding that the District Court's ruling sustaining service would be clearly reviewable in the State Court.

4. In failing to hold that, in any event, it, and not the State Court, was the appropriate forum in which to review the questions of Federal law presented by the District Court's rulings.

---

* While the reporter's preamble to the Court of Appeals' opinion recites that the action has been remanded (92), that refers only to Judge Clancy's opinion on the motion for remand.

5. In failing to hold that the Federal summons and complaint had been served in an illegal manner.

6. In failing to hold that, in any event, in view of the impropriety of the original removal, the issuance of Federal process and the making of the order sustaining it were voidable acts which should have been vacated.

7. In denying the petition for a writ of mandamus directing the District Judge to vacate the order sustaining service and to declare the proceedings had before him to be without force and effect insofar as they related to petitioner.

8. In denying the petition for a common law writ of certiorari to review the order sustaining service.

Reasons for Granting the Writ

1. Certiorari should be granted because this case presents an important question concerning the jurisdiction of the Courts of Appeals to review Federal proceedings in removed cases which are remanded prior to final judgment. The Court below, after expressing "uncertainty as to our power to act in the premises," declined to assume jurisdiction. It is submitted that the decision of the Court below is in conflict with the principles enunciated by this Court in *Waco* v. *U. S. Fidelity & Guaranty Co.*, 293 U. S. 140, in which this Court held that, although an order of remand cannot be upset, the Courts of Appeals should review all proceedings prior to the remand where such proceedings might have lingering prejudicial after-effects.

2. Certiorari is further warranted because this case presents an important question as to the propriety of refusing to exercise jurisdiction where the effect of the refusal is to shift to the State Courts the responsibility for the correction of clearly erroneous orders of a Federal District Court. An examination of the New York law indicates that

the New York Courts have no apparent machinery for such review. Yet the Court below declined to assume jurisdiction upon the theory that the New York State Court is the proper forum to review the decisions of a United States District Court. It is submitted that the Court of Appeals misconceived and distorted the relationship between the State and Federal Courts in thus relinquishing its responsibilities of review in favor of a State Court remedy which is at best dubious and highly speculative. In this respect also, the decision of the Court below conflicts with the principles enunciated by this Court in *Waco* v. *U. S. Fidelity & Guaranty Co.*, 293 U. S. 140.

3. Certiorari is further warranted because the District Court's ruling sustaining the service in the present case is at sharp variance with existing authority and constitutes a clear misinterpretation of the pertinent provisions of the Federal Rules of Civil Procedure. Other Federal Courts have uniformly agreed that those provisions contemplate that service be effected at the permanent residence of a party and upon a person who resides therein. *First National Bank* v. *Ingerton* (10th Cir.), 207 F. 2d 793; *Judson* v. *Judson* (D. D. C.), 9 F. R. D. 336; *Zuckerman* v. *McCulley* (E. D. Mo.), 7 F. R. D. 739; 2 *Moore, Federal Practice* (2d ed.), Par. 4.11, pp. 928-930. In the present case, the purported service was made neither at the petitioner's permanent residence nor upon a person residing therein.

4. Certiorari is further warranted because, in refusing to vacate and set aside its proceedings insofar as they relate to petitioner, the District Court violated well established and fundamental concepts of the nature of removal jurisdiction. It has long been established that, where removal is improper in the first instance, then, upon motion to remand, all proceedings had in the Federal Court will be vacated and set aside. The leading case on the subject is this Court's decision in *Ayres* v. *Wiswall,* 112 U. S. 187,

with which the District Court's ruling in the present case is in conflict.

5. Certiorari should be granted now, prior to final judgment, because this will constitute the only opportunity for this Court to resolve the expressed uncertainty of the Court of Appeals as to its authority to act in the premises. Likewise, this may constitute the last opportunity for any Federal review of Judge Clancy's erroneous rulings. Should the responsibility of reviewing the Federal District Court's decision be left to the State Court, the latter may decide that it lacks the power so to do as a matter of State law.* Such a decision on non-Federal grounds would result in foreclosing a later review by this Court.

ARGUMENT

POINT I

The Court of Appeals had power to review the District Court's rulings.

The power of the Courts of Appeals to review pre-remand proceedings in the District Courts, as distinguished from the remand itself, was affirmed by this Court in *Waco* v. *U. S. Fidelity & Guaranty Co.*, 293 U. S. 140.

In the *Waco* case, an action instituted in a State Court had been removed to the District Court by a non-resident third party defendant on the basis of diverse citizenship and the existence of a separable controversy. The plaintiff moved for remand of the entire action or, in the alternative, for dismissal as against the third party defendant on the ground of improper joinder and remand of the balance of the case. Denying the first alternative, the District Court granted the second, ordering that the third party defendant

* See Point II, *infra*, pp. 13-15.

be dismissed from the case and that the balance of the action be remanded to the State Court. The basis for this disposition was a holding that the original removal had been proper, but that the dismissal as against the third party defendant had the effect of destroying diversity jurisdiction.

Recognizing that the remand itself was non-reviewable, the defendant requested the Circuit Court of Appeals to entertain an appeal from the dismissal as against the third party defendant. The Circuit Court declined to do so on the ground that the non-reviewable remand could not be disturbed even if the dismissal was erroneous.

Although agreeing that the remand could not be disturbed even if the dismissal was erroneous, this Court reversed and held that the Circuit Court was nevertheless required to review the dismissal. One of its effects, this Court pointed out, would be that the third party defendant would no longer be a party to the action after its remand to the State Court. Accordingly, if the order of dismissal was erroneous, the defendant would be unfairly prejudiced by its lingering after-effects in the subsequent proceedings in the case, and was therefore entitled to have the propriety of the order of dismissal reviewed independently of, and notwithstanding, the remand (293 U. S. at p. 143).

Just as the *Waco* case was a situation in which a third party defendant had been eliminated from an action as a result of an erroneous decision of the District Court, the instant case presents a factual situation in which a third party defendant has been brought into the action as a result of the wrongful decision of the District Court. As in the *Waco* case, the District Court's rulings, if erroneous, will unfairly prejudice the petitioner in the subsequent proceedings in the case. It is submitted that, under the principles of the *Waco* decision, those rulings are subject to review by the Court of Appeals.

It may be observed that the present case is distinguishable from the *Waco* case in that here the removal was improper from the outset, while in the *Waco* case the District Court was exercising a valid jurisdiction at the time of the order sought to be reviewed. This distinction suggests that whereas, in the *Waco* case, this Court directed that the order below be reviewed on the merits, here the District Court's acts should be vacated.*

Whichever disposition is appropriate, the *Waco* decision is clear authority for the proposition that remand does not terminate the appellate jurisdiction of the Courts of Appeals to review proceedings taken in the District Court prior to remand. (See also *Moore, Commentary on the 1949 U. S. Judicial Code* 285.)

POINT II

The Court of Appeals erred in declining to review the District Court's rulings by means of an extraordinary writ.

Under the *Waco* decision, as we have seen, remand does not deprive a Court of Appeals of appellate jurisdiction with respect to proceedings previously taken in the District Court. It is submitted that, in the present case, the Court of Appeals erred in declining to exercise that jurisdiction through the medium of an appropriate extraordinary writ.

The principles governing the suitability of employing extraordinary writs have been enunciated on a number of occasions by this Court. Those opinions have emphasized that the availability of the writs is to be determined not so much by technical and formal criteria as by considerations similar to those which govern the availability of equitable relief generally. *Roche* v. *Evaporated Milk Association,* 319 U. S. 21, 25-26; *Ex parte Peru,* 318 U. S. 578, 584; *McClellan* v. *Carland,* 217 U. S. 268; *Bankers Life and Casualty Co.*

---

* See Point II, *infra,* pp. 19-21.

v. *Holland,* 346 U. S. 379. Among the circumstances referred to as relevant to the propriety of issuing a writ are (a) the inadequacy of any remedy by way of appeal, (b) the clearly erroneous character of the ruling below, and (c) the jurisdictional nature of the question presented.

It is submitted that all those elements are present in the instant case.

A. No Adequate Remedy Exists by Way of Appeal.

As already noted, the orders sought to be reviewed here would ordinarily be reviewed on appeal from final judgment. The imminence of remand, however, makes it clear that that machinery will not become available in this case. Accordingly, an extraordinary writ constitutes the only method by which the Court of Appeals can exercise its appellate jurisdiction in the premises.

In denying the petition in the face of this situation, the Court of Appeals took the view that an adequate remedy existed by way of appeal in the State Courts. It is submitted that the denial of the petition on that ground was erroneous for two reasons: first, because examination of the pertinent state law reveals that there is no apparent machinery for such review; second, because review of Federal orders by a state tribunal is, in any event, an inappropriate, inadequate and an improper remedy.

With regard to the first reason, we observe that it has long been the law of New York that objections as to personal jurisdiction cannot be considered once there has been a general appearance in the action. In other words, notwithstanding any attempt to preserve the question by way of affirmative defense, the filing of an answer has been held to waive the objection. *Henderson* v. *Henderson,* 247 N. Y. 428. As already noted, an answer was filed by petitioner following the entry of the order denying the

motion to quash service. This was necessitated by the fact that, under the Federal practice, no appeal could be taken from that order.

The Court of Appeals based its belief that review would nevertheless be available in the State Courts upon the recent addition of a new Section 237-a to the New York Civil Practice Act. That section, insofar as pertinent, provides as follows:

> 237-a. "*Defendant's special appearance.*
>
> 1. Except as otherwise provided in subdivision two, a defendant may make a special appearance solely to object to the court's jurisdiction over his person. Such objection whether based on the ground that process or its service is insufficient or that the defendant is a person not subject to the jurisdiction of the court, may be raised by a motion to set aside the service of process or to strike out part of the complaint, as may be appropriate. The objection, if raised in a manner other than that provided in this section or if combined with an objection to the merits, except as otherwise provided in subdivision four, shall be deemed waived. * * *
>
> 4. After a motion made pursuant to this section has been denied, the defendant may litigate the action on the merits without being deemed to have waived his objection to the court's jurisdiction over his person."

Perusal of that provision discloses that it makes a narrow exception to the general rule heretofore prevailing in New York. That exception is for cases in which a motion to set aside service has been made "pursuant to this section" before any contest on the merits. However, it is not at all clear that the exception is broad enough to include a case like the present one, where the only challenge to the

Court's jurisdiction prior to answer was made not under the provisions of Section 237-a of the New York Statute, but under the Federal Rules of Civil Procedure.

In addition to the foregoing features of State law, a substantial question exists as to whether, as a matter of Federal law, review of Federal rulings is within the power of a State Court. It cannot be denied that, following removal, the case was in the Federal Court. The law may be that, after remand, a State Court has no power to affect orders made under the paramount authority of the United States Courts in a period during which a case was under their control. If this be true, then the failure of the Court of Appeals to take action will mean that, as a matter of Federal law, petitioner can obtain no later review of Judge Clancy's rulings.*

B. The District Court's Order Denying the Motion to Quash Service Was Clearly Erroneous.

Rule 4(d)(1) of the Rules of Civil Procedure provides, in part, that service of a summons and complaint may be effected upon a party by

> "* * * leaving copies thereof at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein * * *."

---

* We note that this view of the law suggests that the order sustaining service in the present case might well be regarded as final, inasmuch as the elimination of the possibility of a Federal judgment has transformed it into "a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it". *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541, 545-547; *U. S.* v. *Cefaratti*, D. C. Cir., 202 F. 2d 13, cert. den. 345 U. S. 907. In the last cited case, a normally interlocutory order granting a motion to suppress certain evidence in a criminal prosecution was regarded as final because the Government would have no right of appeal in the event of an acquittal.

In the present case, service under that rule was purported to be made by leaving a copy of the summons and complaint in the office of the manager of a hotel at which petitioner was stopping for a few days pending his departure on a trip to Europe (28-30, 34). At the time, petitioner was a domiciliary of California and maintained a permanent residence in that state (29-30). The manager resided not at the hotel but in Bayshore, Long Island, N. Y. (41, 48).

It is submitted that the purported service was clearly outside the letter and spirit of Rule 4(d)(1), both with respect to the requirement that it be at petitioner's "dwelling house or place of usual abode", and with respect to the requirement that the papers be left with "a person of suitable age and discretion then residing therein."

Insofar as the first requirement is concerned, the rule clearly contemplates a place at which the party resides with some regularity or permanence, and has been uniformly so understood in previous decisions. *First National Bank* v. *Ingerton* (10th Cir.) 207 F. 2d 793; *Blane* v. *Young* (N. D., Ohio), 10 F. R. D. 109; *Leigh* v. *Lynton* (E. D., N. Y.), 9 F. R. D. 28; *Hancock Ins. Co.* v. *Gooley,* 196 Wash. 357.

In *First National Bank* v. *Ingerton, supra,* 207 F. 2d 793, service was attempted to be effected by leaving a copy of the summons and complaint with the defendant's son, at a private house which the defendant and her son had been sharing during a summer stay of approximately three weeks. As in the present case, the defendant maintained a permanent residence elsewhere. Holding that the permanent residence and not the temporary one was the proper place for substituted service under Rule 4(d)(1), the Court of Appeals for the Tenth Circuit, construing the previous authorities on the subject, stated (at p. 294):

> "We see no conflict in principle in the federal cases which have construed this provision. They all

recognize that the word 'usual' has significance and must be given consideration in determining the validity of such service."

In the present case, the District Judge, in order to sustain service, took the term "dwelling house" out of context, and then, substituting his own term, "dwelling place", held that it did not connote any requirement of permanence or regularity (19). It is submitted that such reasoning was clearly unsound and that the Court took undue liberties with the language of the rule.

It is equally clear that the manager cannot be regarded as a person "residing" in the petitioner's dwelling house or place of usual abode.

The boundaries of any "dwelling house" or "place of abode" are the particular suite of rooms, apartment, or private house in which the party actually resides. *Judson* v. *Judson* (D. D. C.), 8 F. R. D. 336. In the instant case the summons and complaint were not left at the petitioner's suite, nor was the hotel manager a person residing in that suite.

In *Judson* v. *Judson, supra,* 8 F. R. D. 336, service was attempted to be effected by leaving a copy of the summons and complaint with the manager of an apartment-hotel. Notwithstanding the fact that, in that case, the manager lived in the hotel, the Court quashed the service, expressly holding that service upon a resident of the building was not enough.

In the present case the manager did not come within the rule for the additional reason that he could not even be regarded as residing at the hotel, for the undisputed evidence established that he lived on Long Island (41, 48).

The District Judge sought to find residence in the fact that the manager worked at the hotel and spent the better

part of each day there. It is submitted that this did not constitute residence within the spirit or letter of the rule, and that employment at a place does not constitute residence therein.

In *Zuckerman* v. *McCulley* (E. D. Mo.), 7 F. R. D. 739, the fact that the recipient of the papers was the janitor was held insufficient to constitute him a resident. Likewise, in 2 *Moore, Federal Practice,* at p. 930, it is stated that the rule "would seem to exclude a person, such as a servant, who works in the master's house, but resides elsewhere".

It is submitted that the District Judge's decision sustaining the service here violated the underlying concept of Rule 4(d)(1). That rule is plainly designed to provide for a situation where the likelihood that the party will receive notice of the service arises from the fact that process is left at a place of more or less permanent residence with a member of his household or family group with whom he is likely to be in more or less familiar and frequent contact. Manifestly, leaving a summons in the office of a hotel manager does not even remotely resemble such a service.

In the course of his opinion denying the motion to quash, Judge Clancy indicated that his decision was influenced by his belief that petitioner had received actual notice of the service (20-1). However, the record is barren of any legal evidence of the receipt of such notice—the summons and complaint having actually been returned by the hotel manager to the attorney for Kravetz (35, 44-6)—and Judge Clancy acknowledged in his opinion that his belief as to notice was nothing more than an inference drawn from the manner in which the hotel manager had sought to protect petitioner's legal rights (20). It is submitted that the Federal Rules constitute a legislative determination of the circumstances under which it is per-

missible to infer notice, and that Judge Clancy was in error in substituting his own standards for those established by Congress. *Zuckerman* v. *McCulley, supra,* 7 F. R. D. 739; *U. S.* v. *Waverly Club* (S. D. N. Y. 1927) 22 F. 2d 422; 2 *Moore, Federal Practice* (2d ed.) ¶ 4.11, p. 928.

In short, the present case constitutes an instance in which the District Judge, influenced by his belief that actual notice had been received, pushed aside the requirements of the Rules of Civil Procedure. While it is true that Rule 4(d)(1) should be construed liberally so as to provide "a good deal of flexibility and freedom in service" [see *Rovinski* v. *Rowe* (6th Cir.), 131 F. 2d 687, 689], this does not mean that its requirements may be disregarded or its basic concepts ignored [See *Leigh* v. *Lynton, supra,* 9 F. R. D. 28; *Blane* v. *Young, supra,* 10 F. R. D. 109, 110; *Zuckerman* v. *McCulley, supra,* 7 F. R. D. 739]. It is submitted that the District Judge erred in substituting his own standards for those established by the Rule.

C. The Denial of Petitioner's Cross-Motion to Set Aside the Federal Process and the Order Sustaining Service Was Clearly Erroneous.

Since the removal of the action to the Federal Court was improper in the first instance, the acts of the Federal Court were the acts of a tribunal whose acquisition of control over the action was without basis. Accordingly, those acts were voidable and, on the motion for remand, when the impropriety of the original removal was called to the Court's attention, it was the duty of the Court to set aside the proceedings which it had taken under a mistaken notion as to its power.

That this was the proper course is clear in the light of this Court's decision in *Ayres* v. *Wiswall,* 112 U. S. 187, which involved an improperly removed action to foreclose a mortgage. In that case, a decree had been rendered fixing the amount of the obligation and ordering the sale of the

property before the impropriety of the removal was discovered. Granting a motion for remand, the Trial Court recognized its obligation to restore the case to its status as of the date of the removal and included in its order a provision to the effect that all Federal proceedings in the case were "set aside and held for naught" (*id.*, at p. 190). On appeal, that order was affirmed in all respects by this Court (*id.*, at p. 193).

In denying petitioner's cross-motion below, the District Court sought to distinguish the *Ayres* decision by interpreting it as having vacated only the final decree and not the rest of the proceedings. That interpretation was based upon language in the opinion to the effect that the State Court might make whatever use as might be deemed desirable of the Federal "pleadings filed and testimony taken" (*id.*, at p. 190). However, Judge Clancy failed to take into account certain other language on the jurisdictional point, concerning which this Court emphatically declared that any Federal proceeding in a case improperly removed from the State Court could not "of itself confer jurisdiction if there had been none before" (*id.*, at p. 190).

It is submitted that the District Judge misinterpreted the *Ayres* decision. The language upon which he relied means only that where a cause of action is improperly removed from the State Court, then, on remand back, although the interim acts of the Federal Court must be vacated, the State Court can determine what use is to be made to the acts of the *parties*, such as pleadings, testimony, and the like. *Brown* v. *Fletcher* (2d Cir.), 206 Fed. 461, 465. This pertains to the acts of only those parties over whom the State Court validly obtained jurisdiction in the first instance through proper State Court process. However, the acts of the *Court* must be vacated, and this is particularly true of acts which amounted to an assertion of jurisdiction.

In the present case, the District Court, since it had no jurisdiction over the subject matter of the action, did not acquire valid jurisdiction over the person of petitioner, and should not be permitted to transfer to a State Court the fruits of a power which it never rightfully possessed.

D. The District Court's Errors Were Jurisdictional.

While the common-law writs may be used to review non-jurisdictional as well as jurisdictional errors where the circumstances are extraordinary [*McCullough* v. *Cosgrave*, 309 U. S. 634; *Los Angeles Brush Co.* v. *James*, 272 U. S. 701; *cf. Bankers Life & Casualty Co.* v. *Holland*, 346 U. S. 379, 388 (dissenting opinion)], such relief appears to have been most readily available when the claimed error was of the latter type. It is submitted that, while the clarity of the error in the present case, together with the inadequacy of any remedy by way of appeal, suffice to warrant the issuance of an extraordinary writ, such relief is further merited by the fact that the District Court's errors come within the jurisdictional category.

The ruling sustaining service constituted the basis for the District Court's exercise of jurisdiction over petitioner's person. If the service was improper, then the District Court did not rightfully have such jurisdiction. Manifestly, then, the District Court should not be permitted to convey any such wrongful jurisdiction to the State Court, and an extraordinary writ is an appropriate means for preventing that eventuality.

In addition, the later denial of the cross-motion to vacate, apart from its bearing on the Court's jurisdiction over petitioner's person, presents a substantial question as to its jurisdiction over the subject matter. If the original removal was improper, then the District Court never acquired any rightful jurisdiction over the subject matter of the action, and its acts should be set aside at the time of

remand. The refusal of the District Court to make an order to that effect constitutes an attempt to exercise an unwarranted control over the subsequent course of the action. Unless relief is granted through the medium of an extraordinary writ, the net effect of the improper removal will have been an unjustifiable enlargement of the rights of respondent at the expense of the rights of petitioner.

In short, the instant case presents a situation in which erroneous rulings as to peculiarly Federal matters were made by a District Court in an improperly removed case. By these rulings, the District Court assumed a wrongful jurisdiction which it now proposes to convey to the State Court. The remedy of appeal is hopelessly inadequate in the premises. These circumstances are sufficient, we submit, to require the Court of Appeals to take appropriate action to correct the District Courts prejudicial error.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

MYLES J. LANE,
Counsel for Petitioner.

HERBERT P. JACOBY,
STUART G. SCHWARTZ,
of Counsel.

APPENDIX A

Rule 4(d) Rules of Civil Procedure—

(d) Summons: Personal Service. * * * Service shall be made as follows:

(1) Upon an individual other than an infant or an incompetent person, by delivering a copy of the summons and of the complaint to him personally or by leaving copies thereof at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein.

28 U. S. C. § 1651—

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

New York Civil Practice Act § 237-a—

237-a. *"Defendant's special appearance.*

1. Except as otherwise provided in subdivision two, a defendant may make a special appearance solely to object to the court's jurisdiction over his person. Such objection whether based on the ground that process or its service is insufficient or that the defendant is a person not subject to the jurisdiction of the court, may be raised by a motion to set aside the service of process or to strike out part of the complaint, as may be appropriate. The objection, if raised in a manner other than that provided in this section or if combined with an objection to the merits, except as otherwise provided in subdivision four, shall be deemed waived. * * *

4. After a motion made pursuant to this section has been denied, the defendant may litigate the action on the merits without being deemed to have waived his objection to the court's jurisdiction over his person."